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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. _____

SYDELL STONE;
ANNE H. BOWERS;
PATRICIA BRICKING, Individually and as Next Friend On Behalf of Her Infant Children, Jennifer Bricking, Elizabeth Bricking and Erica Bricking; and
RABBI MARTIN M. PERLEY ..... Petitioners

versus

JAMES B. GRAHAM, Superintendent of Public Instruction ..... Respondent

RESPONDENT'S REPLY BRIEF TO PETITION FOR A WRIT OF CERTIORARI

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September 26, 1980

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COUNTERSTATEMENT OF THE CASE

The Statement of the case in the petition is essentially correct and adopted by the Respondent.

REASONS FOR NOT GRANTING THE WRIT

I. The Decision of the Kentucky Supreme Court on This Federal Question is in Accordance With Prior Applicable Decisions of This Court.

A. Under Applicable Decisions of this Court Kentucky's Ten Commandments Law Does Not Violate the Establishment Clause.

We agree with the petition that the three part test for determining whether a state statute violates the Establishment Clause of the First Amendment is the law applicable to this case. That standard was succinctly set forth by this Court in *Lemon v. Kurtzman,* 403 U.S. 602, 612, (1971) as follows:

> "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, and finally, the statute must not foster an excessive government entanglement with religion."

Throughout the trial of this case the attorneys and the Courts considered *Epperson v. Arkansas,* 393 U.S. 97 (1968) and *Abington School District v. Schempp,* 374 U.S. 203 (1963) and other pertinent decisions of this Court. In applying this three part test, the trial Court found from the facts before it and concluded from the legal tests applied the following:

As to purpose:

> "The Legislature has declared the Ten Commandments to be the fundamental legal code of Western Civilization and the common law of the United States. There was proof submitted here that substantiates that declaration. The common law grew under the influence of men who were free to know and study the Ten Commandments and to adopt the principles of the canon law as it related to various subjects under consideration. As one

witness said, 'To attempt to understand Western Civilization apart from the impact of biblical law within it and upon it, is to seek a fictitious history and to reject twenty centuries and their progress.' It has been observed that history of man is inseparable from the history of religion. *Engle v. Vitale,* 370 U.S. 421 8 L. Ed. 2d 601. Western Civilization was founded thereon."

As to effect:

"We do not know the exact language the superintendent of public instruction will use on the plaque. We do know its avowed purpose is to be secular and not religious and thus would neither advance nor inhibit any religion or religious group, even though the language is not exactly adhered to by any group. The difference in the various translations is, for the purpose of display on a wall, so minimal as to be of no consequence. The principal or primary effect is assuredly one that neither advances nor inhibits religion."

And as to entanglement:

"Government involvement in this matter is limited to ensuring that a plaque is placed on each classroom wall, if outside funds are available. No tax funds are to be expended. The government's part begins and ends with hanging the Ten Commandments on the wall. Selection of the wording, and ensuring the display thereof creates so little involvement it could hardly be said to be excessive. In the same vein, if there is any possibility or divisive political potential it has not been shown, nor is it readily discernible."

B. Kentucky's Ten Commandments Law Does Not Violate the Free Exercise Clause of the First Amendment.

In order to establish a Free Exercise case it is necessary to show the coercive effect of the enactment as it operates against the individual in the practice of his religion.

Abington T. p. School District v. Schempp, 374 U.S. 230 (1963), *The Board of Ed. of Cent. Sch. Dist. No. 1 v. Allen,* 392 U.S. 263 (1968). The most the petitioners were able to show below was that the posting of the Ten Commandments was objectionable to the petitioners. Mere objectionableness is not an appropriate ground. As Mr. Justice Jackson pointed out in his concurring opinion in *McCollum v. Bd. of Ed.,* 33 U.S. 203 (1948), there are 256 separate and substantial religious bodies in this country and if we are to eliminate everything that is objectionable to any of these warring sects, or that which is inconsistent with their doctrines, "we will leave public education in shreds".

II. The Decision of the Kentucky Supreme Court Follows the Decisions of This Court and Certiorari is Unwarranted.

As the Kentucky Trial Court stated in this case:

> "Moreover, the fact that the Ten Commandments spring from a religious well does not in itself forever divorce their use for secular purpose. We can think of no good reason why all or any part of the Bible may not be used for other than religious purposes, for secular purposes, for historical and literary purposes."

In *School District of Abington Township v. Schempp,* 374 U.S. 203 (1963) this Court held that a state statute requiring religious exercises in the public schools, consisting of Bible reading without comment and recitation of the Lord's Prayer was unconstitutional. It was argued in that case that if such religious exercises were prohibited, it in effect would be aiding or advancing the tenets of non-believers over those of believers. In meeting that argument, the Court said:

> "We do not agree, however, that this decision in any sense has that effect. In addition, it might well be said that one's education is not complete without a study of

comparative religions or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment . . ."

It is submitted that the *Abington* case itself suggests the legislation in question for what more objective presentation could be made than setting forth the Ten Commandments without comment, without explanation and without any subjectivity whatsoever.

III. The Decision of the Kentucky Supreme Court is Not in Conflict With a Decision of a Federal District Court.

The petitioners argue that the decision in this case is in conflict with *Ring v. Grand Fork Public School District No. 1*, 483 F. Supp. 272 (DND 1980). We submit that there are sharp differences in the two cases.

In the *North Dakota* case the statute required that public funds be used in the placement of the Decalogue. KRS 158.178(3) specifically mandates that only voluntary contributions are to be used. This distinction is particularly important since the North Dakota judge relied heavily on *Meek v. Pittenges*, 421 U.S. 349 (1975) which involved public tax funds appropriated for parochial schools. The entanglement was monetary in nature.

The North Dakota Court emphasized that the North Dakota statute "requires a placard containing the Ten Commandments of the *Christian* religion (Emphasis the Court's)." KRS 158.178 mandates no denominational preference, as does N.D. Cent. Code sect. 15-47-10.

The North Dakota District Court emphasized that N.D.

Cent. Code sect 15-47-10 set forth no secular purpose. KRS 158.178(2) clearly expresses the secular legislative intent and requires the incorporation of that purpose on the displayed copy of the Ten Commandments:

> "In small print below the last commandment shall appear a notation concerning the purpose of the display, as follows: 'The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States'."

And finally *Ring* is not in harmony with *Anderson v. Salt Lake City Corporation*, 475 F. 2d. 29 (10 Cir. 1973) (Cert denied, 414 U.S. 879). In that case the city and county had allowed the Order of Eagles to erect a granite monolith on the courthouse grounds. Inscribed on the monolith were the Ten Commandments along with other religious and non-religious symbols. The U.S. Tenth Circuit Court held that this did not violate the Establishment Clause. The Court in *Ring* distinguished between the *monolith* and the *Decalogue*. A reading of *Anderson* does not disclose such a distinction. It was the display of the Ten Commandments themselves, not the stone monolith that Tenth Circuit found to be of a sufficient secular purpose:

> "So the Decalogue is at once religious and secular, as, indeed, one would expect considering the role of religion in our traditions." Id. at 33-34.

CONCLUSION

In conclusion, it is submitted that the decision of the Kentucky Supreme Court is in harmony with the decisions of This Court, there have been no abragation of First Amendment Rights and the writ of certiorari should be denied.

Respectfully submitted,

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September 26, 1980

PROOF OF SERVICE

I, EDWARD L. FOSSETT, the counsel for the respondent, hereby certify that three (3) copies of the foregoing Respondent's Reply Brief to Petition for a Writ of Certiorari were mailed, first class postage prepaid, to Honorable William Cameron Stone, Kentucky Civil Liberties Union, 2100 First National Tower, Louisville, Kentucky, 40202, Counsel for Petitioners, this 26th day of September, 1980.

Edward L. Fossett

EDWARD L. FOSSETT
Attorney for Respondent